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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT J. MAYBERRY,
Petitioner,

v.

WILLIAM DEES, *et al.*,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents have filed a brief in opposition to the Petition for Writ of Certiorari ("Resp. Br.") that illustrates vividly the fundamental error of the Court of Appeals' decision in this case. In this case a jury returned a verdict finding that petitioner ("Mayberry") had been denied tenure because he had criticized his department chairman, respondent Fernandez, in a manner that was protected by the First Amendment, and that he would not have been denied tenure in the absence of that criticism. Respondents asked the Court of Appeals to overturn the jury verdict on grounds of insufficient evidence, and the Court of Appeals did so. Under the fundamental rules that define the respective functions of judges and juries in the federal system, the only proper inquiry for

the Court of Appeals was whether the record contained any evidence which, if believed by the jury, could rationally support the verdict for Mayberry. The only question in this Court, at this stage of the proceeding, is whether the Court of Appeals' decision adhered to those fundamental rules or whether its decision violates them and sets standards at odds with them.

Respondents have defended the Court of Appeals' decision at length, and in doing so they have fallen into the same error that infected the Court of Appeals' decision. Instead of focusing on the evidence favorable to Mayberry in order to determine whether the jury's verdict in his favor had rational support, respondents wrote their brief as if all factual issues were open for redetermination. They have described extensively the evidence that supports their factual contentions; it is the same evidence that they argued to the jury and that the jury rejected. They have paid little attention to the evidence that supports the verdict. In effect, their argument throughout is that the jury reached the wrong conclusion.

The fact that respondents feel obliged to make such arguments in defense of the Court of Appeals' decision emphasizes how far from the proper course the Court of Appeals strayed. If respondents, and the Court of Appeals, had followed the governing principles and analyzed the evidence supporting the jury's verdict in the light most favorable to Mayberry (see Petn. at 14-15), they could have reached only one conclusion: that the evidence was more than sufficient to support the verdict. We outlined that evidence in the Petition (Petn. at 3-6), and will not repeat it here. It is enough to say that all the support which the verdict needs can be found in a single piece of evidence. That evidence is Mrs. Mayberry's testimony that she pointedly asked respondent Fernandez why he had denied tenure to her husband; in response, Fernandez "waived a copy of the self-study" at her and declared "I knew . . . it was your husband who was going around the Department stirring up trouble for me

and having people make these comments" (Tr. 36-37). The jury was entitled to believe this testimony and to regard it as an unequivocal admission by Fernandez that Mayberry's protected criticism had been the reason for his decision.[1]

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[1] In an exercise of unduly parsimonious construction, respondents argue that the jury could not rationally consider this testimony to be such an admission. They say that Fernandez did not specify *when* he learned of Mayberry's criticism and the admission thus does not rule out respondents' contention that he learned of the criticism only after making the tenure decision (Resp. Br. at 17). (This was also the Court of Appeals' stated reason for disregarding this testimony (Petn. App. 15a).) Such a reading does not give Mayberry the benefit of all inferences that can reasonably be drawn from it, contrary to the governing rules (see Petn at 14-15).

Respondents also argue that this testimony (and the testimony about one other similar admission) lends no support to the verdict because, although Fernandez said he denied tenure to Mayberry because he stirred up trouble during the Self-Study, he did not say that the criticism he was talking about related specifically to the allegation of "stacking" the self-study committee to suppress criticism (Resp. Br. at 17-18). Such a specific reference is unnecessary. Putting aside the fact that the jury could rationally draw such an inference from this testimony, Mayberry's protected speech was not confined to criticism about *stacking* the committee; the jury was instructed, without objection, that Mayberry's protected speech included any criticism of Fernandez regarding "the manner in which he was conducting that part of the school's business in which the public was interested" as long as such speech did not disrupt or impede the University's functioning (Tr. 516-18).

In a similar exercise, respondents argue that another witness's testimony describing another such admission by Fernandez lends no support to the jury's verdict because it referred to a decision regarding *promotion*, not *tenure* (Resp. Br. at 15-16). That argument disregards the reality that a faculty member in his final "up-or-out" year will not be promoted unless he is granted tenure—thus the promotion decision is the same as the tenure decision. Moreover, even if the two decisions were considered independent, the jury rationally could draw from the statement ascribed to Fernandez (Mayberry "was out of the question because he was a trouble-maker") an inference that Fernandez knew of Mayberry's criticism and was motivated to retaliate against him because of it with respect to both decisions.

Because of this evidence and the other record evidence supporting the verdict (see Petn. at 4-6), all of respondents' descriptions of the evidence supporting their contentions, and all of their arguments from it, are simply beside the point. Nonetheless, their brief creates several serious misimpressions about the contents of the record in this case and the effect of the Court of Appeals' decision, which we feel compelled to correct.

1. Respondents repeatedly assert that Mayberry was the least worthy candidate for tenure among the five who were under consideration in the spring of 1972, and that Mayberry's faculty colleagues regarded him as the least worthy candidate. They pepper their brief liberally with quotations, to give the impression that the record is replete with evidence that everyone considered Mayberry a poor choice for tenure and thought the other candidates superior (Resp. Br. at 4-5, 9, 10 n.5, 14-15). If respondents had described the sources of all those quotations, it would be clear that the only evidence supporting their "least worthy" argument is Fernandez's testimony as to his own opinion (see Petn. at 16 & n.13).

Fernandez testified that he thought Mayberry was the least worthy; he did not explain why he thought so (Tr. 279). The jury, of course, was entitled to disbelieve that testimony and conclude that it was a mere self-serving pretext. The source of many of the vivid quotations that appear in respondents' brief is the letter that Fernandez wrote to his administrative superiors recommending that tenure be granted to the other candidates and denied to Mayberry (Resp. Br. at 14).[2] Not surprisingly, in that letter Fernandez spoke of each of the favored four in glowing terms, and then cryptically stated that he recommended Mayberry not be given tenure "[b]ecause of the need to reduce the size of the Spanish faculty" (D. Exh.

[2] That letter was defendants' exhibit 5 at trial; respondents cite it as "A.III, 4-5," referring to its appearance in the appendix filed in the Court of Appeals.

5). The key issue that the jury was asked to decide was whether the statements Fernandez made in that letter were mere pretexts for urging that Mayberry be denied tenure. The jury was entitled to disbelieve the contents of that letter, just as it was entitled to disbelieve his testimony at trial. It appears that the jury did, in fact, disbelieve Fernandez's statements, because it found that Mayberry would not have been denied tenure in the absence of his protected speech.[3]

The only sources respondents cite that do not consist simply of Fernandez's own statements are two sets of anonymous documents that respondents placed in evidence, over petitioner's objection, at the close of trial (Tr. 364-68). Mayberry had no opportunity to cross-examine about them. They were not the subject of any testimony; indeed, Fernandez did not testify that he had placed any weight on their contents. Even those documents do not support respondents' assertions that Mayberry was less worthy for tenure than the other four candidates, for two reasons. First, although the trial court allowed those anonymous statements in evidence, the court ruled that they could not be considered to prove the truth of their contents and so instructed the jury (Tr. 364-68). Second, the anonymous evaluations provide no basis for comparing Mayberry to the other four tenure candidates. One set consisted of anonymous evaluations of Mayberry by other faculty members (D. Exh. 6). Defendants did not offer the comparable evaluations of the other four candidates. The other set consisted of anonymous evaluations by students (D. Exh. 7). They are similarly incomplete, in that the only ones defendants offered were the evaluations by students who had taken courses from Mayberry

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[3] Another similar letter, quoted in Resp. Br. at 5, contains praise of Esther Fernandez, respondent Fernandez's wife, who had been granted tenure on his recommendation in the year prior to the decision on Mayberry. That letter also consists entirely of Fernandez's own statements (P. Exh. 29).

(Tr. 369). Defendants offered no testimony from either faculty or students to supply the crucial element of comparison between Mayberry and the others. The evaluations thus do not prove that Mayberry, as a matter of fact, was the "least worthy" candidate, and, apart from that, the jury was entitled to conclude that Fernandez had given them no consideration.

2. Respondents argue that we have misconstrued the Court of Appeals' opinion and taken certain of its statements out of context, and that the Court of Appeals did not impose on Mayberry the burden of proving that he would have received tenure in the absence of his protected speech, contrary to this Court's ruling in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (Resp. Br. at 9-12). Whatever else the Court of Appeals said or did not say in its opinion, it plainly identified two "factors" that were part of the "causality percentage of the case for which Mayberry, as plaintiff, had the burden of proof" (Petn. App. 19a), and one of those factors was "a favorable prospect, before his protected criticism was uttered, of Mayberry's receiving tenure" (*id.* 18a). That conception of the issues was a necessary ingredient in the Court of Appeals' analysis of the case. The Court's reasoning was that the evidence pertaining to Mayberry's likelihood of getting tenure prior to the criticism did not support a verdict in Mayberry's favor on this issue (*id.* 4a, 14a, 18a); and what the Court perceived as Mayberry's failure of proof on this issue was one of the two "obstacles" that it concluded Mayberry had failed "to overcome" (*id.* 19a).

3. In response to our argument in the Petition that the Court of Appeals applied an outmoded rule that a jury verdict cannot stand when a court believes the evidence to be evenly balanced (Petn. at 17-20), respondents argue that the Court of Appeals both understood and applied the correct rule because it cited earlier Fourth Circuit cases that had rejected the "even balance" rule and adopted

the proper rule (Resp. Br. at 18-19). It is true that earlier Fourth Circuit cases had rejected the "even balance" rule and adopted a rule in accord with this Court's modern decisions, and it is also true that the Court of Appeals cited one of those decisions in its opinion in this case (Petn. App. 15a). But what the Court of Appeals cited cannot change what it did. It ruled that as a matter of law the jury could not rely on Fernandez's admission from the witness stand that he "possibly" knew about Mayberry's protected speech, because, in the Court of Appeals' words, "A statement that one possibly knew implies that he possibly did not know, leaving things very close to an even balance" (Petn. App. 14a). The effect is the same as saying that if a defendant charged with murder took the witness stand and admitted that he "possibly" committed the murder, the jury would not be entitled to conclude that when he said "possibly yes," he actually meant "yes." Such a result cannot be reconciled with this Court's modern decisions on the review of jury verdicts.

4. Finally, respondents suggest that the Court of Appeals' "statistical analysis" can be disregarded because the court said it was only "illustrative" (Resp. Br. at 11). But saying that something is "illustrative" is not the same as saying that it is meaningless. Here, the Court of Appeals' "statistical analysis" served at a minimum to illustrate the reasoning that was operative in the Court's decision. And that reasoning—putting aside the problems with the choice of particular numbers and the method of multiplying them together—rested at bottom on the proposition that even if the evidence on each of two issues standing alone is sufficient to support a jury verdict, the court can set aside the verdict if it regards the evidence on each issue as weak. The principles that govern jury trials in the federal courts do not allow courts to set aside a verdict because they consider the evidence weak (Petn. at 14-17), and that rule does not change whenever the plaintiff must prove more than one element to establish his case.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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